88-1011

Supreme Court, U.S.
FILED
NOV 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

James D. Harman, et.al.,
Appellants

vs.

Ann McLaughlin, et.al.,
Appellees

On Appeal from the United States Court of Appeals from the Third Circuit

---

JURISDICTIONAL STATEMENT

James D. Harman
RD#1, Box 304A
Lykens, PA 17048
(717)682-9693

November 13, 1988

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1989

James D. Harman, et. al.,

Plaintiff, Appellants

vs.

Ann McLaughlin, et.al.,

Defendant, Appellee

QUESTIONS PRESENTED

1. Whether the Court of Appeals improperly invalidated equal protection laws under the 5th Amendment to the Constitution by upholding the District Courts ruling denying the plaintiff an attorney where the United States had joined him as plaintiff in the complaint, see Exhibit #1 showing the defendants conceding section 28 U.S.C.§1345 as jurisdiction of the complaint.

2. Whether the Court of Appeals improperly invalidated the laws in

question by upholding the District Courts ruling that all discrimination complaints by Federal Employees must be filed under section 29 USC 701, et. seq., without considering later amendments or laws.

3. Whether the Court of Appeals improperly did in itself discriminate against the plaintiff in violation of existing laws by limiting the plaintiff to a specific amount of pages while allowing the defendant extra ones.

4. Whether the Court of Appeals improperly upheld the ruling of the District Court that ruled the plaintiff was not allowed to present evidence to support his claim of default against the U.S. Department of Labor, in violation of the Federal Rules of Civil Procedure.

5. Whether the Court of Appeals invalidated existing laws of Congress by improperly upholding the ruling of the

District Court that denied the plaintiff a trial de novo of the facts in a discrimination claim as provided by Title VII of the Civil Rights Act of 1964, 78 Stat. 253. as amended 42 USC§20000e et seq.

6. Whether the Court of Appeals inadvertantly and improperly upheld a District Court ruling that dismissed a claim, where the plaintiff was not allowed any type of discovery to prove his claim.

7. Whether the Court of Appeals erred in upholding the District Courts ruling that upheld the agencys denial of the plaintiff legal representation in violation of section 5 U.S.C.§7114.

8. Whether the Court of Appeals improperly upheld the District Courts ruling that invalidated laws of Congress in particular section 5 U.S.C.§706 (2) where there was insufficient evidence in the record as a whole to support the agencys findings.

9. Whether the Court of Appeals improperly upheld the District Courts ruling to dismiss the case on a motion made by only one of three defendants, and failed to rule on all motions and counts presented to it, thereby violating the plaintiffs due process protection as provided by the Constitution.

10. Has the Court of Appeals itself discriminated against the plaintiff by upholding the District Courts ruling that was based on acts of discrimination where the District Court held separate meetings with the defendant without the plaintiff present.

11. Did the Court of Appeals improperly invalidate Criminal Laws mandated by Congress by upholding the District Courts decision that was based on a proven false sworn affidavit submitted by the defendants in violation of 18 USCA § 241, and 18 USCA §1001, also 18 USCA 1621.

12. Did the Court of Appeals improperly invalidate existing laws of Congress by upholding the District Courts decision that refused to review the merits of the case, along with the due process claims before ruling on the discrimination portion.

13. Whether the Court of Appeals improperly invalidated the Civil Services Reform Act of 1978 by upholding the lower District Court ruling that this act does not create a private cause of action. This is repugnant to the 5th Amendment to the Constitution that guarantees all citizens equality under the law.

14. Whether the Appeals Court improperly upheld the District Courts ruling that a person who cannot see to read small print or do close work is not the type of handicap that the Rehabilitation Act was designed to ameliorate.

15. Whether the Court of Appeals improperly invalidated existing laws of Congress by upholding a lower District Courts ruling that denied the plaintiff a trial by jury, as provided by the Constitution of the U.S. to every citizen whether he is an employee of one organization or another.

16. Whether the Appeals Court improperly invalidated existing laws of Congress by upholding the lower courts ruling that allowed the District Manager John Shutack to deny the plaintiff due process as guaranteed by the 5th Amendment to the Constitution.

17. Whether the Appeals Court improperly invalidated existing laws of Congress by upholding the lower court rulings that upheld the agencys procedural errors in the merits of the case.

PARTIES TO PROCEEDINGS

Plaintiffs	James D. Harman
	United States
Defendants	Ann McLaughlin, Secretary of U.S. Department of Labor
	James Schoffstall, Mine Safety, U.S. Dept. of Labor
	John Shutack, Mine Safety and Health, U.S. Dept. of Labor

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CASES CITED

Chandler V. Rohdenbush, 425 US 840, 48 L Ed 2d 416, 96 S CT 1949

McDonnell Douglas Corp v Green, 411 US 792, 36 L Ed 2d 668, 93 A Ct 1817

Sperling V United States, 515 F2d 465 481-484

Morton V Mancari 417 US 535, 546-7, 41 LEd 2d 290, 94 S Ct 2474

JURISDICTIONAL GROUNDS

Complaint is discrimination and unlawful discharge of a Federal Employee brought to the District Court under 28 U.S.C. § 1331, 5 U.S.C. Sections § 7702 and § 7703 et seq., The Rehabilitation Act and other statues. Defense has conceded that Jurisdiction is also under 28 U.S.C. § 1345.

Jurisdiction of the Third Circuit Court of Appeals is under 28 USC § 1291.

On March 10, 1988 the District Court dismissed the complaint, and a timely notice of appeal to the Third Circuit Court of Appeals was filed. The Third Circuit Court of Appeals affirmed the District Courts decision with a judgment on September 20, 1988. A timely petition for rehearing was filed, and denied on October 19, 1988. A notice of appeal to the Supreme Court of the United States was sent to the Third Circuit Court of

10.

Appeals on November 5, 1988.

The statuatory provisions that confer jurisdiction of the appeal on this Court are 28 U.S.C. §1252, where laws of Congress were invalidated by lower courts decisions. Jurisdiction is granted under Article 111, Sec. 2, of the Constitution which gives this court authority to hear this case.

The plaintiff seeks redress to this court under 42 U.S.C. §1983, and 23 USC §1252.

Cases which sustain this jurisdiction are:

1. Chandler vs. Rohdenbush, 425 US 840, 48 L Ed2d 416.96 S CT 1949.

2. McDonnell Douglas Corp vs Green, 411 US 792, 36 L Ed 2d 668, 93 A Ct. 1817.

3. Sperling vs United States, 515 F2d 465 481-484.

4. Morton vs Mancari, 417 US 535, 546-7, 41 L Ed 2d 290, 94 S Ct 2474.

CONSTITUTIONAL PROVISIONS

This case involves discrimination claims under the Rehabilitation Act of 1973 and later amendments to it, The 5th Amendment to the Constitution, 5 USC §7315, 5 USC §§§7701, 7702, 7703 et seq., 28 USC§1331, 5 USC §7114, 5 USC §7203, 5 CFR 1613:421, 29 CFR 1613.702 et seq., 5 CFR 1201.3 et seq., 5 USC§4303, 5 USC §4304, 5 CFR 432.101 42 USC §2000e-16 et seq., Department of Labor Affirmative Action Program/ 717 C Civil Rights Act of 1964., 18 USCA §241, 18 USCA §1001 Public Laws 89-554, and 95-454. 28 USC§1345, 42 USC §1983, and the Civil Service Reform Act of 1978.

STATEMENT OF THE CASE

James D. Harman is a handicapped Federal Employee who cannot see to do close work. He was denied his privilege of public service, and property, by a supervisor,

James Schoffstall. This supervisor became involved in a stolen car ring, and was arrested by the Penna. State Police in 1983. He pled guilty to one of the charges, and was given a one year probation and ordered to do public work. During the entire time of his arrest, trial, and probationary period, he was allowed to enforce a mine law on coal operators. During this probationary period, in an attempt to take attention from his disgraceful acts, he discriminated against the plaintiff by failing to provide him with the form to obtain prescription safety glasses to perform his hazardous work. Without corrective lenses the plaintiff would make mistakes and attention would be focused from the supervisors actions. When no mistakes other than paperwork were made, which could not be used as a basis for removal, the supervisor backdated and falsified reports to fabricate a poor performance

rating to dismiss the employee. When the employee James Harman pursued his case to the District Court, this supervisor and his attorneys deliberately submitted a proven false sworn affidavit to the court in an attempt to deceive it. This was proven false by the supervisors own testimony at a previous hearing. After the District Court dismissed the complaint without ruling on all the motions, or on all the counts in the complaint, the plaintiff attempted to appeal the case to the Third Circuit Court of Appeals. When this court affirmed the lower courts decision, the plaintiff then brought his case to this honorable court.

SUBSTANTIALITY OF FEDERAL QUESTION

This appeal presents important and substantial questions, as herein described in that if the lower courts decision is upheld, will a dangerous precedent be

set that will bar all federal employees from seeking redress in Federal Courts for their discrimination claims under sections other than 701 of the Rehabilitation Act? Can the lower courts rule only on discrimination portions of a complaint, and ignore the due process claims, and the merits of the case? Is the plaintiff entitled to a trial de novo? The questions presented by this appeal are substantial and of public importance. The case is one of first impressions. It is respectfully submitted that for the foregoing reasons, the Court should summarily reverse the decision of the Court of Appeals, and remand the case to the District court with directions to rule on outstanding motions, all counts in the complaint, and to allow the plaintiff to amend his complaint. In the alternative, the Court should note probable jurisdiction of this appeal and set it down for plenary

briefing and argument, to insure that justice is served, by reviewing all the orders of the Courts.

CONCLUSION

For the reasons stated above, appellant submits that this appeal brings before the court substantial and important Federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution and that if the lower court ruling is allowed to stand precedents will be set that will invalidate laws mandated by Congress, and deprive a large precentage of Federal Employees their basic rights as guaranteed by the Constitution.

Dated November 13, 1988

Respectfully submitted

James D Harman

James D. Harman
RD#1, Box 304A
Lykens, PA 17048
Phone (717)682-9693

CERTIFICATE OF SERVICE BY MAIL

James D. Harman, Appellant
vs
Ann McLaughlin, et. al., Appellee

The undersigned James D. Harman appellant is a person of such age and discretion as to be competent to serve papers. He served on November 15, 1988 copies of the Appellants notice of Appeal and Jurisdictional statement to the Supreme Court of the U.S. to all parties below listed, by placing said copies in a postpaid envelope addressed to each of the parties, and depositing said envelopes and contents in the United States Mail at Hegins, PA.

Clerk, Appeals Court
21400 U.S. Courthouse
601 Market St.
Philadelphia, PA 19106

Frederick E. Martin
307 Post Office Bldg
Lewisburg, PA 17837

Solicitor General
Department of Justice
Washington, D.C. 20530

Willie M. Alexander
U.S. Dept. of Labor
Washington, D.C.

James D. Harman
RD#1, Box 304A
Lykens, PA 17048

Subscribed and sworn to
before me this 12th day
of December, 1988

Notarial Seal
Notary Public
My Commission Expires Feb. 9, 1989

(FROM DEFENDANTS REPLY BRIEF, PAGE #2)

Court of Appeals Third Circuit

over prohibited discrimination claims (i.e. race, age, and handicap). Williams v. Department of the Army, 715 F.2d 1485 (Fed. Cir., 1983); Wiggins v. U.S. Postal Service, 653 F.2d 219 (5th Cir. 1981). The Appellees, however, do not concede the district court's jurisdiction under 5 U.S.C. Sections 7702 and 7703 (b)(2) over Harman's suit. The district court also had jurisdiction under 28 U.S.C. 1331 and 1345.

E 2.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

James D. Harman,

Plaintiff Civil No. 87-0410

vs. Complaint Filed 3/19/87

Anne McLaughlin, United States Secretary of Labor, et. al., (Judge Muir)

Defendants

ORDER #2 of March 10, 1988

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

This case is on our July 1988, trial list. Currently before us is the Defendants motion to dismiss James D. Harman's second amended complaint.

On March 19, 1987, James D. Harman filed a complaint in which he pled various causes of action relating to his allegedly improper termination as a Coal Mine Safety and Health Inspector with the United States Department of Labor, Named as defendants in that complaint were William Brock, then the Secretary of Labor of the United States, James Schoffstall, a Mine Safety Supervisor in the Department of Labor, and

the United States Department of Labor. By order of September 24, 1987, we granted Secretary Brock's motion to dismiss the complaint or for a more definite statement and we permitted Harman to file an amended complaint. Also in our September 24, 1987, order, we dismissed Harman's complaint with prejudice insofar as it named Schoffstall and the United States Department of Labor as defendants in a cause of action predicatd upon the Rehabilitation Act, 29 U.S.C. §701, et. seq.

On October 5, 1987 Harman filed an amended complaint in which Secretary of Labor William Brock was named as the sole defendant. By order of November 4, 1987, we granted Secretary Brock's motion to dismiss Harman's amended complaint and we permitted Harman to file a second amended complaint within 30 days. Harman filed a second amended complaint on December 1, 1987, in which

he named as defendants Anne McLaughlin, the Acting Secretary of Labor of the United States, John B. Shutack, an officer or employee of the Mine Safety and Health Administration of the United States Department of Labor, and James E. Schoffstall. The Defendants filed a motion to dismiss Harman's second amended complaint on December 15, 1987. (We note that in the caption of the Defendants' motion to dismiss Harman's second amended complaint, the Defendants have substituted the name of Dennis E. Whitfield, the Deputy Secretary of Labor, for the name of Anne McLaughlin which appears in the caption of Harman's second amended complaint. We assumed that this substitution by the Defendants was in response to the timing of McLaughlin's confirmation as Secretary of Labor. See Fed.R.Civ.P. 25(d). The brief in support of the Defendants' motion to dismiss Harman's second

amended complaint contains the name of Anne McLaughlin in the caption and designates her as the Secretary of Labor.) On December 23, 1987, the Defendants filed a brief in support of their motion to dismiss Harman's second amended complaint. Harman filed a brief in opposition to the Defendants' motion to dismiss December 30, 1987. The Defendants did not file a reply brief.

Harman's second amended complaint contains 13 counts, all of which relate to his allegedly improper termination as a Coal Mine Safety and Health Inspector with the Department of Labor. In Count 1 of Harman's second amended complaint he alleges causes of action pursuant to the Fourteenth Amendment of the United States Constitution, the Civil Service Reform Act of 1978, the Office of Personnel Management Regulations, and 5 C.F.R. §432.101 et seq. The

Fourteenth Amendment does not regulate the federal government or its officers or employees; therefore, Harman cannot state a cause of action pursuant to it against any of the Defendants, all of whom are federal officers or employees. We also conclude that the Civil Service Reform Act of 1978 does not create a private cause of action. See Schrachta vs. Curtis, 752 F.2d 1257, 1259 (7th Cir. 1985), and cases cited therein. We assume that the Office of Personnel Management regulations that Harman is referring to in Count 1 are the regulations cited in Count 1 -- 5 C.F.R. §432.101 et seq. Those regulations were made pursuant to Pub.L. 95-454. See 5 C.F.R. §432.101; 5 U.S.C.A. §4302(b) (West Supp. 1987). Pub.L. 95-454 is the Civil Service Reform Act of 1978. See 1978 U.S. Code Cong. & Ad. News 2723. There-

fore, the Office of Personnel Management regulations promulgated pursuant to the Civil Service Reform Act of 1978 also does not provide a private right of action. Harman in Count 2 of his second amended complaint alleges a cause of action pursuant to the EEOC regulations codified at 29 C F R 1613. 701 et seq. The only way Harman can allege a cause of action pursuant to those regulations is if he alleges a cause of action pursuant to the Rehabilitation Act of 1973, which is codified at 29 U.S.C. §701 et seq. See United States Code Annotated: Title 29, §§601 to 800, at p. XIX (West 1985). To state a cause of action pursuant to the Rehabilitation Act of 1973, Harman must prove that he is a handicapped person within the meaning of the statue. See Forrisi vs. Bowen, 794 F2d 931, 933 (4th Cir. 1986). Harman

in his second amended complaint, ¶2, describes his handicap as follows: "The plaintiff is handicapped because he cannot see to read small print or do close work. . . With the aid of corrective lenses, the plaintiff is a qualified handicapped person." We are of the view that Harman's alleged handicap does not entitle him to state a cause of action pursuant to the Rehabilitation Act of 1973. Harman's handicap is not the type of handicap that that act was designed to ameliorate. See Forrisi vs. Bowen, 794 F2d at 933-934. Therefore, Harman does not state a cause of action pursuant to 29 C.F.R. 1613.701, et seq.

Also in Count 2, Harman alleges causes of action pursuant to 5 U.S.C. §7203, 18 U.S.C. §241, the Office of Personnel Management "policies," the "AFL-CIO union agreement," and the Department of Labor "affirmative action

program." None of these provide a private cause of action for Harman. See, e.g., Neal vs. United States Postal Service, 468 F.Supp. 958, 960-961 (D. Utah 1979) (indicating no private cause of action pursuant to 5 U.S.C. §7203); United States vs. City of Philadelphia, 482 F.Supp. 1248, 1259-1261 (E.D. Pa. 1979) (18 U.S.C. §241 neither authorizes any civil suits nor creates any civil liability), aff'd 644 F.2d 187 (3d Cir. 1980).

Harman alleges a cause of action pursuant to the Fifth Amendment in Count 3 of his complaint. We are of the view that Harman is barred from suing any government officer or employee for any injury allegedly suffered by Harman as a result of a violation of Harman's federal constitutional rights that resulted from his employment relationship with the federal government. See Bush vs. Lucas, 462 U.S. 367 (1983).

Harman also alleges a cause of action in count 3 of his complaint pursuant to 5 U.S.C. §7114. This statutory section addresses the rights and duties of a labor organization which has been accorded exclusive recognition in a particular unit within the federal government. There are no allegations in Harman's complaint that any labor organization committed any acts of commission or omission which might be actionable. Therefore, we conclude Harman does not state a cause of action pursuant to 5 U.S.C. §7114.

Count 4 of Harman's second complaint alleges a cause of action pursuant to 5 U.S.C. §7701 et seq. The aformentioned sections regulate the proceedings before the Merit Systems Protection Board and also regulate appeals from the Merit Systems Protection Board. Since Harman does not allege any discrimination of the type specified in 5 U.S.C.A. §7702 (West 1980), Harman may only seek review of final orders or decisions of the Merit Systems Protection

Board that relate to this case in the United States Court of Appeals for the Federal Circuit. 5 U.S.C.A. §7703(b) (West 1980 & West Supp. 1987); see also Williams vs. Department of Army, 715 F.2d 1485, 1487-1488 (Fed. Cir. 1983). Harman therefore does not state a cause of action in his complaint pursuant to 5 U.S.C. §7701 et seq. Harman also alleges a cause of action in Count 4 of his comlaint pursuant to 5 U.S.C. §556. This section governs the conduct of certain administrative hearings. Because of our conclusions that Harman has not stated a cause of action pursuant to 5 U.S.C. §7701 et seq. and that he has not stated a cause of action pursuant to the Fifth Amendment, we conclude he has not stated a cause of action pursuant to 5 U.S.C. §556.

Count 5 of Harman's complaint alleges a cause of action pursuant to 5 U.S.C. §4304 et seq. These sections are part of

the Civil Service Reform Act of 1978 and therefore do not provide a private cause of action.

Count 6 of Harman's complaint alleges among other things, a cause of action pursuant to 5 U.S.C. §4301. This is purely a definitional section and cannot serve as a basis for a cause of action. See 5 U.S.C.A. §4301 (West Supp. 1987).

Count 7 of Harman's complaint alleges a cause of action pursuant to the NCFLL Labor Union agreement. We conclude that this agreement does not give Harman a private cause of action in this Court.

Harman alleges a cause of action pursuant to 18 Pa. Cons. Stat. §4904 in Count 8 of his complaint. This section provides criminal penalties for unsworn falsification to authorities. This section does not provide a private cause of action to Harman in this Court. Cf. Bush vs. Lucas, 462 U.S. 367. Harman also alleges, in Count 8 of his complaint, a cause of

action pursuant to 18 U.S.C. §1001. That section provides criminal penalties for, among other things, making false or fraudulent statements with knowledge that they are false or fraudulent. This section however, does not provide a civil cause of action to Harman for the Defendants' alleged violation of this statue. Fiorino vs. Turner, 476 F.Supp. 962, 963 (D. Mass. 1979). (9, 10, 11, 12, /??)

Count 13 of Harman's complaint alleges a cause of action pursuant to the Merit Systems Protection Board regulations. Based on the discussion above, we conclude that these regulations do not provide a cause of action to Harman in this Court. Harman also alleges in Count 13 a cause of action pursuant to 18 U.S.C. §1621. This section defines the criminal offense of perjury. Based on our discussion above concerning 18 U.S.C. §1001, we conclude that §1621 does not provide a civil cause of action to Harman.

The paragraph following Count 13 of Harman's complaint alleges a cause of action pursuant to 5 U.S.C. §7513 et seq. Since these sections were part of the Civil Service Reform Act of 1978, they cannot be the basis for a cause of action for Harman.

Finally, Harman also alleges a cause of action pursuant to 5 U.S.C. §5596. That section does not provide a cause of action for Harman in this Court; it merely enumerates what relief a federal employee is entitled to if that employee has been subjected to an unjustified or unwarranted personnel action. Because none of the causes of action alleged by Harman in his second amended complaint can be pursued in this Court, 5 U.S.C. §5596 does not provide Harman with an avenue of ingress to this Court.

Based on the above analysis of the causes of action pled by Harman in his second amended complaint, we conclude that none of them can be pursued in this

Court.

NOW, THEREFORE, IT IS ORDERED THAT:

The Defendants' motion, filed December 15, 1987, to dismiss Harman's second amended complaint is granted with prejudice.

MUIR, U.S. DISTRICT Judge

MM:be

UNITED STATES OF APPEALS
FOR THE THIRD CIRCUIT

NO. 88-5229

Harman, James D.,
Appellant

vs.

U.S. DEPARTMENT OF LABOR,
McLaughlin, Ann, Secretary of Labor
Schoffstall, James, Supervisor
Department of Labor, Wash., D.C.

NO. 88-5290

HARMAN, JAMES D.,
Appellant

vs.

U.S. DEPARTMENT OF LABOR,
Brock, William, Secretary of Labor
Schoffstall, James, Supervisor
Department of Labor, Wash., D.C.

On Appeal from the United States
District Court For the Middle
District of Pennsylvania (Scranton)
(D.C.. Civil Action No. 87-0410)
District Judge: Honorable Malcolm Muir

Submitted September 6, 1988

BEFORE: STAPLETON, GREENBERG, AND SCIRICA
Circuit Judges

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ORDERED AND ADJUDGED that:

1. Appellant's motion to dismiss is denied.

2. The judgment of the district court be and is hereby affirmed.

3. Costs are taxed against appellant.

By the Court,

_____
Circuit Judge

ATTEST:

_____
Clerk

Dated: SEP 20 1988

costs taxed in favor of Secretary of Labor, et.al, as follows:

BRIEF . . . $28.60

Certified as a true copy and issued in lieu of a formal mandate on October 27, 1988.

Test:
Clerk, United States Court of Appeals
for the Third Circuit

E 18.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 88-5229

HARMAN, JAMES D.,
Appellant

vs.

U.S. DEPARTMENT OF LABOR,
McLAUGHLIN, ANN, Secretary of Labor
SCHOFFSTALL, JAMES, Supervisor
Department of Labor, Wash., D.C.

NO. 88-5290

HARMAN, JAMES D.,
Appellant

vs.

U.S. DEPARTMENT OF LABOR,
BROCK, WILLIAM, Secretary of Labor
SCHOFFSTALL, JAMES, Supervisor
Department of Labor, Wash., D.C.

SUR PETITION FOR REHEARING

BEFORE: GIBBONS, Chief Judge, SEITZ,
HIGGINBOTHAM, SLOVITER, BECKER,
STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, AND COWEN,
Circuit Judges

The petition for rehearing filed by appellant in the above-entitled cases

having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

_____
Circuit Judge

Dated: OCT 19 1988

E 20

(FILED NOVEMBER 9, 1988)

UNITED STATES COURT OF APPEALS
For the Third Circuit

James D. Harman,
Plaintiff

V. Docket Nos. 88-5229
and
Ann McLaughlin, Secretary
of U.S. Dept. of Labor, 88-5290
et. al.,
Defendant

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that James D. Harman, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the final judgment upholding the lower courts decision entered in this action on September 20, 1988. A timely petition requesting review of the judgment was requested, and denied on October 19, 1988.

This appeal is taken pursuant to 28 U.S.C. §1252.

DATED: November 5, 1988

Respectfully Submitted

James D. Harman

CERTIFICATE OF SERVICE BY MAIL

James D. Harman,
Plaintiff

V.

Docket Nos 88-5229 and 88-5290

Ann McLaughlin, U.S. Dept. of Labor, et. al.,
Defendants

The undersigned James D. Harman, Plaintiff is a person of such age and discretion as to be competent to serve papers. He served on Nov. 5, 1988 copies of the Plaintiffs notice of appeal to the United States Supreme Court to all parties listed below, by placing said copies in a postpaid envelope addressed to each of the parties, and depositing said envelopes and contents in the United States Mail at Klingerstown, Pa.

Clerk
Supreme Court of the United States
Washington, D.C. 20543

Solicitor General,
Department of Justice
Washington, D.C. 20530

Frederick E. Martin
307 Post Office Bldg.
Lewisburg, PA 17837

James D. Harman

Subscribed and sworn to
before me this 12th day
of December 1988

Notarial Seal

E 22.

November 13, 1988

To: Clerk, U.S. Court of Appeals
U.S. Courthouse, 601 Market St.
Philadelphia, Pa. 19106-1790

From: James D. Harman
RD#1 Box 304A
Lykens, PA 17048

Dear Sir:

And now in accordance with rule 13 of the Rules of the Supreme Court, it is hereby requested that you certify and transmit the record of the case docketed in your court as 88-5229 and 88-5290, to the Clerk, U.S. Supreme Court Washington, D.C.

James D. Harman

James D. Harman
RD#1 Box 304A
Lykens, PA 17048

E23

December 1, 1988

MINE SAFETY AND HEALTH ADMINISTRATION
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203-1984

Mr. James D. Harman
RD#1, Box 304 A
Lykens, Pa. 17048

Dear Mr. Harman;

This letter is in regard to your request under the Freedom of Information Act (FoIA), 5 USC 552, for "copies of all information contained in any file ..." concerning you. You additionally requested ".... copies of any memorandum, letter, or printed material in any form that contains ..." your name.

This is to advise you that a review of our records reveals no information maintained by this office meeting the descriptions you provided.

For your information, this agency no longer has an office of Internal Affairs. Records which were previously maintained by that office are now maintained under the authority of the Director, Administration and Management, Mine Safety and Health Administration (MSHA). A review of those records reflects no files with your name as the subject.

Accordingly, this is to advise you that there are no files maintained in the Directorate of Administration, MSHA, which meet the descriptions you provided, and which MSHA is able to identify on the information you provided.

Sincerely,

Russell B. Swanson
Director of Administration and Management

(THIS LETTER PROVES THAT THERE IS A LACK OF INFORMATION IN THE RECORD TO SUBSTANTIATE THE AGENCYS FINDINGS OR THE AGENCY IS IN VIOLATION OF THE FREEDOM OF INFORMATION ACT.)

CERTIFICATE OF SERVICE BY MAIL

James D. Harman, et. al.
Plaintiffs

V.

Ann McLaughlin, U.S.Dept. of Labor, et. al,.
Defendants

Docket Nos 88-5229
and
88-5290

The undersigned James D. Harman, Plaintiff is a person of such age and discretion as to be competent to serve papers. He served on December 13, 1988, copies of the corrected Jurisdictional Statement for the appeal to the U. S. Supreme Court in the above case, by placing three copies in a postpaid envelope addressed to each of the parties listed below, and placing said envelopes and contents in the United States Mail, at Hegins, Penna.

Frederick E. Martin
307 Post Office Bldg
Lewisburg, Pa. 17787

Willie M. Alexander
U. S. Department of Labor
Washington, D. C. 20210

I do also hereby swear that I deposited the original Jurisdictional Statement in the U. S. Mail at Hegins, Pa on November 13, 1988, and sent copies to the above named.

James D. Harman
James D. Harman
RD#1, Box 304 A
Lykens, Pa. 17048

Subscribed and sworn to
before me this 12th day
of December, 1988

Hannah V. Harner

Notarial Seal
Hannah V. Harner, Notary Public
Hegins Township, Schuylkill County
My Commission Expires Feb. 8, 1989